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Attorneys for Defendant
CB Richard Ellis, Inc. incorrectly
sued herein as CB Ellison

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RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COPY

CORNEALIUS LOPES, TERESA LOPES

Plaintiff,

vs.

FREMONT FREEWHEELERS; K&K
INSURANCE, USA CYCLING NORHTERN
CALIFORNIA AND NEVADA CYCLING
ASSOC. (NCNCA), ROBERT PARKER;
LAWRENCE UPTHEGROVE; LLOYD
RATH; RICHARD BROCKIE, GARY
BIRCH, SALLY WILSON, JASON SAGE,
TIM O'HARA, JEFF WRONG, JOSEPH
DALE WREN C.B.ELLISON, BRYAN
SHEPPARD, LARRY NOLAN, STEVE
GRUSIS, LARRY ROSA FREMONT
FREEWHEELERS RACE TEAM, LIND
BUFFETTI, JOE BAUGHMAN AND PETER
ALLEN, FFBC RACE TEAM ALAMEDA
COUNTY DISTRICT ATTORNEY,
NEWARK POLICE DEPT., CASEY
CARRINGTON, JIM DAVIS, ALAMEDA
COUNTY SHARA MESIC DEPUTY D.A.,
LISA FARIA DEPUTY D.A. PETAGREW
DEPUTY D.A.

Defendants.

Case No.: CV 07-6213 JL

DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO DISMISS
PURSUANT TO RULE 12(b)(6)

Date: January 30, 2008

Time: 9:30 a.m.

Courtroom: Magistrate-Judge James Larson

I. NATURE OF RELIEF REQUESTED

Defendant CB Richard Ellis, Inc. incorrectly sued as CB Ellison moves to dismiss plaintiff's complaint against it on the grounds that the applicable statute of limitations bars plaintiff's complaint. Plaintiff has sued for an injury arising out of an accident that occurred on June 12, 2004. In fact, plaintiff actually had previously sued the moving party and dismissed that action against the moving party on or about January 17, 2007. Plaintiff's complaint in this action was filed on November 2, 2007 with a first amended complaint filed on November 8, 2007. Pursuant to California Code of Civil Procedure §335.1 a plaintiff suing for personal injuries has two years from the date of injury to file suit or June 12, 2006. Hence, plaintiff's complaint in this action is time barred and should be dismissed as to defendant CB Richard Ellis, Inc.

II. PERTINENT FACTS

The claims in plaintiff's present action arise out of an accident between plaintiff and some bicyclists that occurred on June 12, 2004 in Fremont, California. Plaintiff, who is African-American, apparently was later criminally convicted of assault and battery against other persons and for a hate crime arising out of that accident. The moving party had nothing to do with the events or actions that gave rise to the accident or anything that followed. Apparently on June 12, 2004 the Fremont Freewheelers bicycle group had a bicycle race in Fremont. Plaintiff was a runner and entered onto the race course running against the flow of the bicycles until there was an accident between some bicyclists and plaintiff. Plaintiff apparently then later was criminal convicted for assault and battery arising out of actions following the accident and for a hate crime for making vile anti-Semitic remarks about one of the bicyclist's background.

Plaintiff originally filed suit with an attorney representing him on March 16, 2006. (See Request for Judicial Notice and plaintiff's complaint) He dismissed with prejudice the moving party on or about January 17, 2007. (See Request for Judicial Notice and Request for Dismissal).

1 For reasons that the moving party does not understand, plaintiff then filed the instant
2 action on or about November 2, 2007. (See Summons issued in action in Removal papers) He
3 then filed a first amended complaint on November 8, 2007. In that complaint he alleges in
4 Count 10 that CB Ellison had something to do with the race and his alleged injury that
5 occurred on June 12, 2004. This is the only count where plaintiff alleges any claim against
6 this defendant.

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8 **II. PLAINTIFF'S CLAIMS ARE BARRED BY RES JUDICATA AND THE STATUTE**
9 **OF LIMITATIONS**

10 Plaintiff's claim against the moving party is barred by res judicata. Plaintiff dismissed
11 his claims arising out of the June 12, 2004 race when he filed his dismissal with prejudice.
12 The court may take judicial notice of these official records for purposes of this Rule 12(b)(6)
13 motion. *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994); *Day v. Moscow*,
14 955 F.2d 807, 811 (2nd Cir. 1992)

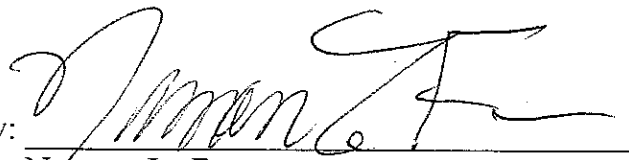
15 Even if that dismissal was not effective, plaintiff's complaint is barred by the
16 applicable statute of limitations. California Code of Civil Procedure §335.1 provides that an
17 action for personal injury arising out of a wrongful act or neglect of another must be brought
18 within two years of when the cause of action accrued. In this case the cause of action accrued
19 on June 12, 2004 so plaintiff had until June 12, 2006 to bring his lawsuit. The filing of this
20 lawsuit on November 2, 2007 is clearly well beyond the two years.

21 For the reasons set forth above, defendant requests that the court dismiss plaintiff's
22 complaint and each cause of action against it and award costs to defendant as and against
23 plaintiff.

1 Dated: December 12, 2007

Fortune, Drevlow, O'Sullivan & Hudson

2
3 By:



4 Norman La Force

5 Attorney for Defendant

6 CB Richard Ellis, Inc. incorrectly
7 sued herein as CB Ellison
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